

4.4.1 New gTLD Applicant Freedom of Expression

- 4.4.1.1 Explanation of the Subject

The 2007 Final Report attempted to balance the rights of applicants, as noted in Principle G, and others related to the program, as noted in Recommendation 3.

Principle G:

The string evaluation process must not infringe the applicant's freedom of expression rights that are protected under internationally recognized principles of law.

Recommendation 3:

Strings must not infringe the existing legal rights of others that are recognized or enforceable under generally accepted and internationally recognized principles of law. Examples of these legal rights that are internationally recognized include, but are not limited to, rights defined in the Paris Convention for the Protection of Industry Property (in particular trademark rights), the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR) (in particular freedom of expression rights).

The issue, as identified by the DG, is whether ICANN gives adequate consideration to the protection of human rights, particularly with respect to new gTLDs and right to freedom of expression, freedom of association, freedom of religion, and principle of non-discrimination. This issue received particular attention upon the publication of a report by the Council of Europe, originally presented during the ICANN50 meeting in London that took place from 22 to 26 June 2014, entitled, "ICANN's Procedures and Policies in the Light of Human Rights, Fundamental Freedoms and Democratic Values."¹

The issue raised by the report, and also by other groups within ICANN, is ICANN's impact on fundamental human rights, such as the right to freedom of expression or the right to privacy. More specifically, the Council of Europe seeks to determine ICANN's global public interest responsibilities from an international human rights perspective. The report references the Universal Declaration of Human Rights (UDHR),² the International Covenant on Economic, Social

¹See "ICANN's Procedures and Policies in the Light of Human Rights, Fundamental Freedoms and Democratic Values," Council of Europe, Updated 08 October 2014 at http://www.coe.int/t/information/society/Source/DGI_2014_12E%20Report%20ICANN%20and%20Human%20Rights%20updated%2008%20Oct%202014.pdf

² See Universal Declaration of Human Rights (UDHR) at <http://www.un.org/en/documents/udhr/>

and Cultural Rights (ICESCR),³ the International Covenant on Civil and Political Rights (ICCPR),⁴ and the European Convention on Human Rights (ECHR).⁵

While the report notes that “ICANN’s remit does not generally extend to any examination of the content comprised in or to be hosted under TLDs” it further notes that “the approval or rejection of applied-for new gTLD strings may involve an evaluation process where judgments related to content are made.”⁶ If such judgments result in the denial of an application for a new gTLD string they may violate the applicant’s right to freedom of expression.

To better understand this issue, it may be useful to briefly review the Initial Evaluation process as described in the Applicant Guidebook (AGB). The AGB notes that one of the two main elements of the Initial Evaluation is the string review (concerning the applied-for gTLD string). This evaluation includes a determination that the applied-for gTLD string is not likely to cause security or stability problems in the DNS, including problems caused by similarity to existing TLDs or reserved names.⁷ (A “string” is the string of characters comprising an applied for gTLD.⁸) In addition, as described in Module 3 of the Applicant Guidebook, the Governmental Advisory Committee (GAC) may provide Advice on New gTLDs to the ICANN Board of Directors concerning a specific application, or a dispute resolution procedure may be triggered by a third party’s formal objection to an application.⁹

Objections that trigger the dispute resolution procedure include: 1) “String Confusion Objection”: a string is confusingly similar to an existing top-level domain or another string applied for in the same round of applications; 2) “Existing Legal Rights Objection”: a string comprising the potential new gTLD infringes the existing legal rights of others; 3) “Limited Public Interest Objection”: the string comprising the potential new gTLD is contrary to generally accepted legal norms relating to morality and public order that are recognized under principles of international law; or 4) “Community Objection”: substantial opposition to the application from a significant portion of the community to which the string may be explicitly or implicitly

³ See International Covenant on Economic, Social and Cultural Rights (ICESCR) at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/ICESCR.aspx>

⁴ See International Covenant on Civil and Political Rights (ICCPR) at <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>

⁵ See European Convention on Human Rights (ECHR) at http://www.echr.coe.int/Documents/Convention_ENG.pdf

⁶ See “ICANN’s Procedures and Policies in the Light of Human Rights, Fundamental Freedoms and Democratic Values,” Council of Europe, Updated 08 October 2014, Chapter 2, at http://www.coe.int/t/information/society/Source/DGI_2014_12E%20Report%20ICANN%20and%20Human%20Rights%20updated%2008%20Oct%202014.pdf

⁷ See Applicant Guidebook Module 1, Introduction to the gTLD Application Process at <https://newgtlds.icann.org/en/applicants/agb/intro-04jun12-en.pdf>

⁸ See new gTLD glossary at: <http://newgtlds.icann.org/en/applicants/glossary>

⁹ See Application Guidebook Module 3, Objection Procedures at <https://newgtlds.icann.org/en/applicants/agb/objection-procedures-04jun12-en.pdf> and New gTLD Dispute Resolution Procedure at <https://newgtlds.icann.org/en/applicants/agb/evaluation-questions-criteria-04jun12-en.pdf>

targeted.¹⁰

Finally, Module 4 of the Applicant Guidebook, String Contention Procedures, notes that “ICANN will not approve applications for proposed gTLD strings that are identical or that would result in user confusion. If either situation above occurs, such applications will proceed to contention resolution through either community priority evaluation, in certain cases, or through an auction.”¹¹

According to the Council of Europe report, “The use of domain names, including gTLDs, concerns forms of expression that are protected by international human rights law which, in Europe, the 47 member states of the Council of Europe have undertaken to secure as part of the framework of civil and political rights and freedoms provided in the ECHR.”¹² The report further notes that the European Court of Human Rights has emphasized that the Internet has become one of the principal means for individuals to exercise their right to freedom of expression.¹³ The report emphasizes that “freedom of expression is one of the classic fundamental rights laid down in the constitutions of many countries and in many international treaties, including Article 29 of the Universal Declaration of Human Rights and, Article 19 of the International Covenant on Civil and Political Rights.”¹⁴

- *4.4.1.2 Questions and Concerns Related to Subject*

In Section 2.4 Human Rights Analysis of the New gTLD Application Procedures the report notes that there have been “several cases and disputes involving potentially ‘sensitive expressions’ in applied-for gTLDs which exemplify the delicate balance needed to protect the fundamental rights of applicants and other Internet users.”¹⁵ It also notes that in addition to the GAC’s “Early Warning” channel, the Community Objection procedure might involve human rights considerations and cites the case of the .xxx gTLD application. In addition, the report notes that

¹⁰ See New gTLD Dispute Resolution Procedure at <https://newgtlds.icann.org/en/applicants/agb/evaluation-questions-criteria-04jun12-en.pdf>

¹¹ See Applicant Guidebook Module 4, String Content Procedures at <https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>

¹² See “ICANN’s Procedures and Policies in the Light of Human Rights, Fundamental Freedoms and Democratic Values,” Council of Europe, Updated 08 October 2014, 2.3. Human Rights Framework Applicable to gTLD at http://www.coe.int/t/information/society/Source/DGI_2014_12E%20Report%20ICANN%20and%20Human%20Rights%20updated%208%20Oct%202014.pdf

¹³ Judgment of the European Court of Human Rights of 18 December 2012, § 54.

¹⁴ Ibid, 2.3.2. Relevant Provisions at http://www.coe.int/t/information/society/Source/DGI_2014_12E%20Report%20ICANN%20and%20Human%20Rights%20updated%208%20Oct%202014.pdf

¹⁵ Ibid, 2.4.1 Problematic and Sensitive Applied-for Strings at http://www.coe.int/t/information/society/Source/DGI_2014_12E%20Report%20ICANN%20and%20Human%20Rights%20updated%208%20Oct%202014.pdf

a trademark protection objection could be used as a means to limit the freedom of expression.¹⁶ The report recommends that when assessing the possible restriction of offensive expression ICANN should “consider legal models outside of trademark law to better address the balance of speech rights.”¹⁷

The Council of Europe report uses the problems as noted by many in the community in regards to the Community Priority Evaluation (CPE) process. According to the Applicant Guidebook, if there is no self-resolution string contention for community-based applicants of identical strings a CPE may be requested.¹⁸ The Council of Europe report noted, “The scope of ‘community’ could have an impact on human rights. A narrow interpretation could restrict the ability of community organizations to associate, for example, to group them together to achieve goals. The Community Priority Evaluation Guidelines as published by the Economist Intelligence Unit (EIU) use a stringent interpretation of communities, with the result that certain diverse and heterogeneous communities are not protected.” It should be noted that the CPE Guidelines stem directly from the requirements as defined in the AGB. The report recommends that ICANN should use as a basis to prioritize between different applicants the concept of vulnerable groups, which would enable ICANN to take positive measures to proactively serve the public interest¹⁹.

The Application Guidebook notes that most cases of string contention will be resolved by the CPE or be self-resolved. In those cases that are not resolved, the auction may be used as a tie-breaker method.²⁰ The Council of Europe report states that “the auction procedure constitutes an inappropriate method to serve the public interest, since it has the potential to disproportionately award gTLDs to financially richer entities.”²¹

The Council of Europe report recommended that 1) reference to human rights should be included in ICANN’s Bylaws; 2) ICANN should define public interest objectives; 3) ICANN should

¹⁶ Ibid, 2.4.2 Freedom of Expression and Trademarks at

http://www.coe.int/t/information/society/Source/DGI_2014_12E%20Report%20ICANN%20and%20Human%20Rights%20updated%208%20Oct%202014.pdf

¹⁷ Ibid, 2.4.3. Sensitivities and Varying Levels of Acceptable Criticism at

http://www.coe.int/t/information/society/Source/DGI_2014_12E%20Report%20ICANN%20and%20Human%20Rights%20updated%208%20Oct%202014.pdf

¹⁸ See Applicant Guidebook Module 4, String Content Procedures at

<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>

¹⁹ See “ICANN’s Procedures and Policies in the Light of Human Rights, Fundamental Freedoms and Democratic Values,” Council of Europe, Updated 08 October 2014, 2.4.4. Case Study on String Contention Procedures: Community Applications at

http://www.coe.int/t/information/society/Source/DGI_2014_12E%20Report%20ICANN%20and%20Human%20Rights%20updated%208%20Oct%202014.pdf

²⁰ See Applicant Guidebook Module 4, String Content Procedures at

<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>

²¹ See “ICANN’s Procedures and Policies in the Light of Human Rights, Fundamental Freedoms and Democratic Values,” Council of Europe, Updated 08 October 2014, 2.4.5. Auction Procedures: Equality & Non-Discrimination at

http://www.coe.int/t/information/society/Source/DGI_2014_12E%20Report%20ICANN%20and%20Human%20Rights%20updated%208%20Oct%202014.pdf

improve the human rights expertise and early engagement in the GAC; 4) develop an early engagement mechanism for the safeguard of human rights; and 5) review ICANN's legal basis and explore innovative solutions for developing an international or quasi-international status of ICANN.

The Council of Europe report generated considerable interest in the ICANN community such that the community is already discussing various approaches to address the issue. In its comments on the report, the ICANN Non-Commercial Stakeholder Group (NCSG) noted that while it disagreed with some of the definitions and recommendations offered in the report, it welcomed the report, "which confirms many of the views submitted by ICANN's noncommercial users over the years" and it fully agreed "with the authors' assessment that several of ICANN's policies fall short of international human rights standards and that those standards must be mainstreamed and more systematically applied within ICANN." In addition, the NCSG noted that it shared "the view that the public interest is a standard that lacks sufficient specificity to appropriately guide policy or constrain ICANN's decisions in several policy areas of relevance to human rights."²² The NCSG subsequently created a Cross Community Working Party on ICANN's Corporate and Social Responsibility to Respect Human Rights, which held a public session at the ICANN 53 meeting in Buenos Aires, Argentina on 24 June 2015.

In addition, the GAC London Communiqué on 25 June 2015 noted, "the written analysis on ICANN's procedures and policies in the light of human rights, fundamental freedoms and democratic values, prepared by experts of the Council of Europe. The GAC noted that there is a developing interest in the ICANN community to include human rights issues in future discussions."²³ The GAC subsequently created the GAC Human Rights and International Law Working Group, which presented its Terms of Reference at the ICANN 53 meeting in Buenos Aires.²⁴

- 4.4.1.3 *Relevant Guidance*
 - Principle G
 - Recommendation 3

- 4.4.1.4 *Rationale for Policy Development*

Staff notes that the community has only just established groups dedicated to a discussion of the possible impact of new gTLDs on human rights and whether ICANN's policies and procedures should be modified to more systematically take into account international human rights standards. Staff recommends that if a PDP-WG is initiated on New gTLD Subsequent Procedures,

²² See NCSG Comments Council of Europe Report on ICANN and Human Rights, August 2014 at: <https://community.icann.org/download/attachments/49356853/NCSGCommentonCOEICANNreport2014.pdf?version=1&modificationDate=1412646434000&api=v2>

²³ See <https://gacweb.icann.org/display/GACADV/2014-06-25+Safeguards+-+Human+Rights>

²⁴ See <https://buenosaires53.icann.org/en/schedule/mon-human-rights-law>

it should reach out to the community, and particularly the NCSG and the GAC as they have shown significant interest in the topic, to determine the status of current community discussions on this issue.

It should also be noted that the Cross Community Working Group on Enhancing ICANN Accountability (CCWG) seeks to integrate human rights impact analyses within its mission, which should provide guidance to this PDP-WG in its deliberations.